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ABSTRACT

This paper summarizes implications of the Americans with Disabilities Act (ADA) on public education. It notes similarities between the ADA and Section 504 of the Rehabilitation Act of 1973 which already prohibits discrimination against people with disabilities in most public schools. The ADA is seen as having its main impact in the area of employment, with school districts being required to make reasonable accommodations for people with disabilities and prohibited from requiring a medical examination prior to an offer of employment. The ADA is not seen as affecting requirements of the Individuals with Disabilities Education Act (IDEA) to provide students with disabilities a free and appropriate education. The paper first addresses general provisions of the ADA, then reviews provisions of Title I regarding employment, Title II regarding public services, and Title V (miscellaneous provisions). Case law interpreting Section 504 and IDEA is then reviewed, addressing the issues of: (1) the definition of a "qualified individual with a disability"; (2) what "reasonable accommodations" include; and (3) what is a "free appropriate public education." (Contains 19 references.) (DB)

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A Legal Memorandum

National Association of Secondary School Principals

The Americans with Disabilities Act and Its Impact on Public Education

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A Legal Memorandum

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The Americans with Disabilities Act And Its Impact on Public Education

Numerous articles and commentaries have been written about the Americans with Disabilities Act (hereafter "ADA" or the "Act"),[1] but very little has been written about the ADA's impact on public education.

Signed into law on July 26, 1990, the ADA is a comprehensive statutory scheme designed to prohibit discrimination against the handicapped in many activities conducted by both public and private entities.

The Act will probably have its greatest impact in the private sector, since the provisions of the ADA are patterned after the provisions of Section 504 of the Rehabilitation Act of 1973,[2] which already prohibits discrimination against the handicapped by agencies receiving federal financial assistance, and therefore covers most public schools.

Nevertheless, the ADA will affect public education in several respects, the main impact being in the area of employment. School districts, as well as all other education employers covered by the Act, will have to make reasonable accommodation for disabled individuals and appropriate modifications to nonessential functions of their programs. School districts will also be prohibited from making medical inquiries or requiring a medical examination prior to an offer of employment. It does not appear that the passage of the ADA will affect the requirements to provide elementary and secondary students with disabilities with a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).[3]

I. General Provisions

The introduction to the Act contains congressional findings that 43 million Americans have one or more physical or mental disabilities and that the number is increasing as the population grows older. Congress further found that discrimination against individuals with disabilities persists in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. The purposes of the Act are:

1. To provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities
2. To provide clear, strong, and consistent enforceable standards addressing discrimination against individuals with disabilities
3. To ensure that the federal government plays a central role in enforcing the standards established in the Act on behalf of individuals with disabilities
4. To invoke the sweep of congressional authority, including the powers to enforce the Fourteenth Amendment and to regulate commerce, to address the major areas of discrimination faced daily by people with disabilities.

Section 3 of the Act defines "disability" as a physical or mental impairment that substantially limits one or more of an individual's major life activities, a record of such an impairment, or an observation that such an impairment exists. This definition is virtually identical to the definition of "handicapped" in Section 504 of the Rehabilitation Act. The term "auxiliary aids and services" is defined as including qualified interpreters, qualified readers, taped texts, acquisition or modification of equipment or devices, and similar services and actions.

II. Employment

Title I outlines the provisions of the Act regarding employment. The term "qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. The Act goes on to state:

> For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

The Act defines the term "reasonable accommodation" to include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and similar accommodations for individuals with disabilities.[4]

The ADA does not require an employer to provide reasonable accommodation to a qualified individual with a disability if it would be an undue hardship.[5]

The Act prohibits an employer from discriminating against a qualified individual with a disability in job application procedures, hiring, advancement, discharge, compensation, job training, or other terms and conditions and privileges of employment.

A key area where the ADA has specified employment procedures concerns medical examination and inquiries of a job applicant that it prohibits an employer from conducting to determine if the applicant has a disability. The ADA does allow pre-employment inquiries, however, into the ability of an applicant to perform job-related functions.

The Act allows employers to require a medical examination only after they offer employment to a job applicant and prior to the applicant beginning the job, provided that all entering employees are subjected to such an examination regardless of disability. Relevant information from the applicant's medical examination must be maintained in a separate and confidential medical file. This medical file may be available only to supervisors and managers to determine necessary restrictions on the work or duties of the employee, to determine any reasonable accommodations, for first aid or emergency treatments, and for investigating compliance by appropriate government officials.

The ADA also prohibits an employer from requiring a medical examination or inquiring of the employee as to the nature or severity of a disability unless the examination or inquiry is shown to be job-related and consistent with business necessity. Voluntary medical examinations are permissible as part of an employee health program, and an employer may inquire into the ability of an employee to perform job-related functions.

Section 504 and its implementing regulations do not discuss job descriptions or medical examinations. In all other respects, the employment provisions of the ADA and Section 504 and its implementing regulations are indistinguishable.

III. Public Services

The ADA defines "public entity" as any state or local government or department, agency, special purpose district, or other instrumentality of a state or local government. This definition includes school districts.

Under Title II relating to public services, a "qualified individual with a disability" is one who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities the public entity provides.

Under the provisions of Title II, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity or be subjected to discrimination by any such entity. As indicated above, this prohibition would apply to students, parents, and independent contractors as well as employees.

The remedies for a violation of Title II include the procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973 and include reinstatement with back pay, civil action by the Attorney General or Equal Employment Opportunities Commission, injunctive relief, and attorney fees.

IV. Miscellaneous Provisions of the Act

Title V of the Act contains several miscellaneous provisions. It authorizes awards of attorneys' fees to a prevailing party, prohibits retaliation against anyone exercising their rights under the ADA, authorizes states to establish higher standards for protecting the disabled, and abrogates state immunity from damages under the ADA.

Title V excludes from the definition of "disabled" transvestites, persons who engage in homosexuality and bisexuality, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use. Also excluded from the term "individual with a disability" are those using drugs illegally when the employer acts on the basis of such use. The definition includes, however:

1. Persons who have successfully completed a supervised drug rehabilitation program and are no longer illegally using drugs, or who have otherwise been rehabilitated successfully and are no longer using drugs
2. Persons participating in a supervised rehabilitation program and no longer engaging in drug use
3. Persons erroneously regarded as having used drugs, but who have not in fact done so.

V. Qualified Individuals with Disabilities Under the ADA

As discussed above, the ADA defines a qualified individual with a disability in much the same manner as an otherwise qualified handicapped individual under Section 504. In *Southeastern Community College* v. *Davis*,[6] the U.S. Supreme Court held that Davis was not an otherwise qualified handicapped individual under Section 504.

Davis, who was not able to understand speech except through lip reading, had been denied admission to the community college nursing program. The school rejected her application for admission because it believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

The Supreme Court held that the decision to exclude Davis from the community college's nursing program was not discriminatory within the meaning of Section 504 of the Rehabilitation Act of 1973. The Supreme Court stated:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications to their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in the federally funded program solely by reason of his handicap, indicating only that mere possession of a handicap is not a permissible ground for *assuming* an inability to function in a particular context ... An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap. [emphasis added]

The Supreme Court noted that legitimate physical qualifications may be essential to participation in particular programs and found that the ability to understand speech without reliance on lip reading is necessary for patients' safety during the clinical phase of the program and is indispensable for many of the functions that a registered nurse must perform.

The Court rejected Davis' contention that Section 504 required the school to undertake affirmative action that would dispense with the need for effective oral communication. The court also rejected Davis' suggestions that she could be given individual supervision by faculty members whenever she attends patients directly or that certain required courses might be dispensed with.

In holding that Section 504 does not require such a fundamental alteration in the nature of a program, the Court stated:

> Moreover, *an interpretation of the regulations that required the extensive modifica-*

> *tions necessary to include Respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals they would do more than clarify the meaning of Section 504, instead they would constitute an unauthorized extension of the obligations imposed by that statute* ... Neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds ... [emphasis added]

The Court acknowledged that the difference between illegal discrimination and affirmative action will not always be clear, particularly in light of the rapid technological advances taking place. The Court concluded that whether a refusal to accommodate the needs of a disabled person constitutes discrimination must be determined on a case by case basis, but clearly ruled out major modifications to programs:

> In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination ... Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.

VI. Reasonable Accommodation

Following the Supreme Court's decision in *Davis*, a number of federal agencies promulgated regulations defining reasonable accommodation[7] that have been incorporated into the statutory language of the ADA. While both instances have defined reasonable accommodation in terms of employment, the courts have applied the principle to public school programs.

In *Brookhart* v. *Illinois State Board of Education*[8] the court of appeals cited *Southeastern Community College* v. *Davis* and held that the State of Illinois was not required to lower its graduation requirements to accommodate handicapped students. The appeals court also held that, had the State of Illinois given handicapped students sufficient notice of the test requirements, the graduation requirement would not have violated Section 504.

In *Colin K.* v. *Schmidt*[9] the court of appeals held that 504 does not require school districts to provide handicapped students with residential placements. In *Turillo* v. *Tyson*[10] the district court stated, "While Section 504 might require a school system to modify the school to accommodate handicapped children, it never compels the school system to finance a private educational placement."

In *Rothschild* v. *Grottenthaler*[11] the court of appeals applied the principle of reasonable accommodation to hearing-impaired parents of nonhearing-impaired children who attended schools in the district. The parents requested that a sign language interpreter be provided at district expense to assist the parents at parent-teacher meetings. The parents alleged they needed a sign language interpreter to establish a meaningful parent-teacher relationship.

The appeals court noted that courts must strike a balance between reasonable accommodations to permit access to handicapped persons and the financial and administrative burdens of requiring such accommodation. The court noted that Section 504 does not mandate substantial modifications to accommodate the handicapped. The court of appeals stated:

> The Rothschilds' entitlement to sign-language interpreter services provided at School District expense is limited, however, to those activities directly involving their children's academic and/or disciplinary progress.

The court of appeals agreed with the lower court's reasoning, but modified the district court's judgment and held that the parents were not entitled to a sign language interpreter at the children's graduation ceremony.

In *Sullivan* v. *Vallejo City Unified School District*[12] the district court granted a preliminary injunction prohibiting the school district from preventing a handicapped student from bringing her service dog to school.

The 16-year-old disabled student had cerebral palsy, learning disabilities, and right-side deafness. Her service dog was trained to help her overcome her physical disabilities.

In holding that the school district violated Section 504 by failing to reasonably accommodate the student, the district court stated:

> The Supreme Court has held that Section 504 imposes on federally funded programs a duty to accommodate handicapped persons, to the extent possible, to ensure that nonessential requirements and practices do not arbitrarily deprive genuinely qualified persons of the opportunity to participate in a covered program ... As noted above, a defendant's refusal to modify an existing program to eliminate nonessential requirements that would prevent a handicapped person from participation must be condemned as unreasonable and discriminatory ... On the other hand, an accommodation is not reasonable if it either imposes an undue financial or administrative burden on the grantee or requires a fundamental alteration in the nature of the program.

The court noted that (1) allowing a service dog onto a school campus did not impose an undue financial or administrative burden on the school district; (2) California law provides physically handicapped persons with the right to be accompanied by a service dog; and (3) the dog had undergone rigorous training. In rejecting the school district's space and health concerns, the court noted that the dog allowed the student to have greater control over her environment and enjoy greater independence by not having to rely on others to perform simple physical tasks. By denying access to the service dog, the school district diminished the student's ability to function independently.

In *Wynne* v. *Tufts University School of Medicine*[13] the court of appeals discussed the extent to which schools and universities must modify their testing procedures to accommodate the handicapped.

The plaintiff alleged that his learning disability placed him at an unfair disadvantage in taking written multiple-choice examinations.

The appeals court found that Tufts considered alternative means of testing and came to a justifiable conclusion about the adverse effects of plaintiff's proposed accommodation. The court of appeals stated:

> Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why, in the departmental chair's words, 'the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry ... ' It concluded that [changing test procedures] would require substantial program alterations, result in lowering academic standards, and devalue Tufts' end product—highly trained physicians carrying the prized credential of a Tufts degree. ... Tufts decided ... that no further accommodation could be made without imposing an undue (and injurious) hardship on the academic program ... Given the other circumstances extant in this case, we do not think that a reasonable fact finder could conclude that Tufts, having volunteered such an array of remedial measures, was guilty of failing to make a reasonable accommodation merely because it did not also offer Wynne, unsolicited, an oral rendering of the biochemistry examination.

The court of appeals concluded that Tufts University had met its burden of proof and granted summary judgment in favor of Tufts. The district court reached a similar conclusion in *McGregor* v. *Louisiana State University Board of Supervisors.*[14]

In *McGregor* a law student with orthopedic and neurological handicaps sought changes in the law school's testing procedures. The record showed that the law school allowed the student to stay in school even though his grades were below the required minimum and also allowed him to take tests at home the first year. The school moved the student's classes to more accessible locations and professors gave him considerable tutorial assistance. The following year, the student was not allowed to take his exams at home, but had his choice of locations and extra time.

Later, he was not allowed to proceed to the third year of law school because his grades were below the minimum required. The student then sought a part-time schedule and the right to take examinations at home. The law school refused.

The district court, finding that the law school program was full time and that other students were not allowed to take examinations at home, stated:

> In requesting to proceed to the junior level without the requisite first year grade average,

> to attend law school on a part-time basis, and to take his exams at home plaintiff seeks substantial changes in the Law Center's program. Forcing the law school to restructure its program to meet these demands is beyond the scope of section 504. Plaintiff's requests if granted would constitute preferential treatment for plaintiff, not elimination of disadvantageous treatment. The undisputed facts show that defendant made many reasonable accommodations for plaintiff in an effort to meet his special needs; in fact, defendants often went beyond their statutory duty under section 504. Despite those accommodations, plaintiff did not meet the Law Center's academic requirements. Plaintiff's claim under section 504 must fail.

The court noted that while other universities may have part-time programs, Section 504 did not require Louisiana State University to establish a part-time program.

Both the ADA and Section 504 define reasonable accommodation in terms of employment; since the definitions are virtually identical, it can be expected that the courts will apply the same standards and principles set forth in the cases discussed above to education programs under the ADA.

VII. Free Appropriate Public Education and the ADA

While the ADA prohibits discrimination against the disabled, it does not specifically guarantee the right to a free appropriate education.[15] Section 504 also prohibits discrimination against the disabled, but does not explicitly guarantee the right to a free appropriate public education.[16] Therefore, the case law interpreting Section 504 will not, most likely, provide guidance to future courts in interpreting the provisions of the ADA. In *Timms* v. *Metropolitan School District*,[17] the court of appeals stated:

> We agree with the Eighth Circuit, however, that the Rehabilitation Act is broader than the EAHCA [now IDEA] in the range of federally funded activities it reaches but narrower in the kind of actions it regulates ... As Monahan notes ... Section 504 is prohibitory, forbidding exclusion from federally-funded programs on the basis of the handicap, rather than mandatory, creating affirmative obligations. See, *Southeastern Community College* v. *Davis* ... The EAHCA, by contrast, because of its focus on appropriate education, imposes affirmative duties regarding the content of the programs that must be provided to the handicapped. Because Section 504 forbids exclusion from programs rather than prescribing the program's content, it reaches grosser kinds of misconduct than the EAHCA.

In *Smith* v. *Robinson*,[18] the U.S. Supreme Court concluded that Congress intended the IDEA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The Court noted that Section 504 and the IDEA are substantive statutes; while the IDEA guarantees a right to a free appropriate public education, Section 504 simply prohibits discrimination on the basis of handicap. In discussing the difference between Section 504 and the IDEA, the Court stated:

> ... although both statutes begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA ... *There is no suggestion that Section 504 adds anything to petitioners' substantive rights to a free appropriate public education.* The only elements added by Section 504 are the possibility of circumventing EHA administrative procedure and going straight to court with a Section 504 claim, the possibility of a damage award in cases where no such award is available under the EHA, and attorneys' fees. [emphasis added]

The Supreme Court added that it was not the intent of Congress to allow plaintiffs to use Section 504 to circumvent the remedies set forth in the IDEA.

In response to *Smith* v. *Robinson*, Congress amended the Education of the Handicapped Act (now IDEA) in 1986.[19] As noted in the legislative history, the amendment's purpose was to provide prevailing plaintiffs with attorney fees in IDEA civil actions.

There is nothing in the legislative history of the 1986 amendments or in the amendments themselves to indicate that Congress intended to enlarge the substantive rights of handicapped children under Section 504 of the Rehabilitation Act. Rather, it appears Congress intended to enlarge parents' procedural rights to bring action under Section 504 which Congress believed were limited by the Supreme Court in *Smith* v. *Robinson* (although administrative remedies under IDEA must be exhausted), to allow award of attorney fees, and to allow damages under Section 504 which may not be available under the IDEA.

Assuming that the ADA would be interpreted in the same way as Section 504, had Congress intended the ADA to guarantee a disabled child's right to a free appropriate public education, it would have enacted language in the ADA guaranteeing the right to a free appropriate public education. Congress' silence on the issue in light of the Court's decision in *Smith* v. *Robinson* indicates that Congress intended the IDEA to be the main vehicle for enforcing the right to a free appropriate education and intended that the ADA would reach grosser forms of discrimination against the disabled in the same manner as Section 504.

VIII. Conclusion

From a review of the case law interpreting Section 504 and the IDEA, it appears that the ADA will have its most dramatic impact in the private sector. Public agencies have been prohibited from discriminating against the handicapped under Section 504 for many years; the ADA incorporates many of these prohibitions and applies them to the private sector.

Neither the language nor the legislative history of the ADA addresses the issue of a free appropriate public education. Therefore, it is unlikely the Congress intended the ADA to guarantee a free appropriate public education to students. It appears that Congress believed that the right to a free appropriate public education is adequately protected under the IDEA.

It therefore appears that the major impact of the ADA on public education will be in its role as an employer. The role of job descriptions in determining the essential functions of a job will increase in importance when attempting to determine whether the employer has tried to reasonably accommodate the disability of the employee. The scope of medical examinations and inquiries to all employees will also be limited to job-related inquiries consistent with business necessity and then only after an offer of employment has been made.

It remains to be seen whether public education will be affected in other areas. As new issues are raised and litigated, public education may be affected in ways not previously anticipated.

Endnotes

1. Pub. L. 101-336, 42 U.S.C. §§ 12101-12213.
2. 29 U.S.C. § 794.
3. 20 U.S.C. §§ 1440, *et seq.* Formerly, the Education of the Handicapped Act (EHA).
4. 42 U.S.C. § 12111(9). This definition is virtually identical to the definition of reasonable accommodation under § 504. See 34 C.F.R. Part 104, Appendix A, 489 (1988).
5. The term "undue hardship" means an action requiring significant difficulty or expense when considering the following factors:
   a. The nature and cost of the accommodation needed under the Act
   b. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation
   c. The number of persons employed at such facility
   d. The effect on expense and resources, or the impact otherwise of such accommodation upon the operation of the facility
   e. The financial resources of the covered entity
   f. The size of the business of a covered entity with respect to the number of its employees
   g. The number, type and location of its facilities
   h. The type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity
   i. The geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

6. 442 U.S. 397, 99 S.Ct. 2361, 60 *L.Ed.* 2d 980 (1979).
7. See, e.g., 34 C.F.R. Part 104, Appendix A, 489 (1988).
8. 697 F.2d 179, 193 (7th Cir. 1983).
9. 715 F.2d 1, 9 (1st Cir. 1983). See *contra* 34 C.F.R. § 104.33(c)(3), which requires school districts to provide private residential placement.
10. 535 F.Supp. 577, 588 [3 *Ed. Law Rep.* [639]] (D.R.I. 1982).
11. 907 F.2d 286 (2nd Cir. 1990).
12. 731 F.Supp. 947 (E.D. Cal. 1990).
13. 976 F.2d 791 (1st Cir. 1992).
14. E.D. La. July 24, 1992.
15. The regulations promulgated to enforce Title II of the Act contain no provisions relating to a free appropriate public education.
16. *See, Smith* v. *Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 *L. Ed.* 2d 746 (1984).
17. 722 F.2d 1310 (7th Cir. 1983).
18. *See* footnote 16, *supra.*
19. *See*, Pub. L. 99-372.

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